(4)

No. 88-977

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., et al.,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, et al.,

Appellees.

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The questions presented by this Motion to Dismiss are:

1. Whether this court has jurisdiction to review federal questions that were not raised in the highest state court having jurisdiction to review the questions until the appellants filed their petitions for rehearing, which petitions were summarily denied; and

2. Whether the appellants have raised substantial federal questions that have not already been decided in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983).

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The appellee Public Utilities Commission of the State of Colorado ("CPUC") moves the court for an order dismissing the appeal herein or, in the alternative, for an order affirming the judgment of the Supreme Court of the State of Colorado on the grounds that one of the 2 questions on which the decision of the cause depends is so insubstantial as to need no further argument, and that as to both questions on which the decision of the cause depends the court does not have jurisdiction.

STATEMENT OF FACTS

The matter before the court had its origins on December 15, 1981 when appellant Colorado-Ute Electric Association, Inc. ("Colorado-Ute") filed with CPUC Advice Letter No. 45 and revised tariff Schedules A and B (App. 1-6). Revised Schedules A and B contained the terms under which Colorado-Ute would sell wholesale electric power to its 14 member cooperatives ("members").

Colorado-Ute generates electric power at coal-fired and hydro-electric powerplants located within the State of Colorado. Wholesale sales by Colorado-Ute to its members under revised Schedules A and B are made to each member either at a bulk delivery point (Schedule B) or at a load center delivery point (Schedule A). All bulk delivery points and load center delivery points are located within Colorado. Members of Colorado-Ute have been certificated by CPUC defined geographic service areas located wholely within the State of Colorado.

In Advice Letter No. 45, Colorado-Ute stated that the purpose of the filing was to increase Colorado-Ute's

gross revenues from its members by 12.157 percent (App. 2). The 12.157 percent increase became effective on Janurary 15, 1982.

On January 12, 1982, CPUC commenced Case No. 6076 to investigate the justness and reasonableness of Colorado-Ute's 12.157 percent increase and revised Schedules A and B. (Appellants' A-96). All 14 members of Colorado-Ute were granted permission to intervene, as was a number of other parties, including Exxon Company, U.S.A. ("Exxon"), Atlantic Richfield Company ("ARCO") and Shell Oil Company ("Shell"). (Appellants' A-98). Colorado-Ute made its first discovery request for the WASP-82 computer program (subject of appellants' Question No. 2) on October 7, one day after the trial in Case No. 6076 had commenced. Colorado-Ute had been made aware of the existence of the WASP-82 program by the CPUC staff at a meeting with Colorado-Ute on February 7, 1982, 7½ months before the hearing commenced (App. 7-10). CPUC's Rules of Practice and Procedure provide for discovery pursuant to the Colorado Rules of Civil Procedure. CPUC responded to Colorado-Ute's late discovery request by directing its staff to make a full exchange of information with Colorado-Ute relative to the WASP-82 program, subject to the proprietary nature of the program (Appellants' A-144).

On July 26, 1983, CPUC entered Decision No. C83-1176 (Appellants' A-93). In this decision, CPUC approved the 12.157 percent increase contained in Advice Letter No. 45, but directed Colrado-Ute to re-implement a demand/energy rate structure for its wholesale sales to its members and to abandon the experimental unit pricing (flat energy rate) (Appellants' A-120, 121, 138). In

designing the demand/energy rates, CPUC allocated $24,084,126 in generation fixed costs to the energy component of the demand/energy rates (Appellants' A-119). Also in this decision, CPUC found that the WASP-82 evidence was irrelevant to the merits of Case No. 6076, since Case No. 6076 involved an investigation of the justness and reasonableness of the wholesale power rates charged by Colorado-Ute to its members, whereas the WASP-82 study concerned the benefits to be derived at the retail level by members utilizing demand/energy retail rates (Appellants' A-110).

Colorado-Ute and 13 of its 14 members filed for judicial review of CPUC Decision Nos. C83-1176, C83-1392 and C83-1561 pursuant to Colo. Rev. Stat. sec. 40-6-115 (1973) in the Montrose County District Court, Colorado, and ARCO and Exxon filed for judicial review in the Denver District Court, which case was transferred to the Montrose County District Court and consolidated for hearing with the case filed by Colorado-Ute and its members. Colorado-Ute's and its members' action was assigned Case No. 83 CV 218, and ARCO's and Exxon's action was assigned Case No. 84 CV 7.

In the district court, Colorado-Ute and its members argued in Case No. 83 CV 218; (1) that CPUC did not have jurisdiction under Colo. Rev. Stat. sec. 40-6-111(4) (1984), to investigate a tariff filed by a cooperative electric association, unless a member or customer of the cooperative, or an affected public utility filed a complaint (Appellants' A-74); (2) that CPUC could not reject a tariff filed by a cooperative electric association and direct the filing of a new tariff, unless CPUC first found that the existing tariff was unjust, unreasonable, discriminatory,

or preferential and further found that the new tariff was just, reasonable, non-discriminatory and non-preferential (Appellants' A-76); (3) that CPUC could not disregard the convenience and preference of Colorado-Ute and its members in designing Colorado-Ute's wholesale power rates by substituting a different rate structure (Appellants' A-82); (4) that Colorado-Ute's rights to due process under the Fourteenth Amendment to the United States Constitution and Colo. Const. art. II, sec. 25 were violated by the admission of testimony based on the WASP-82 computer analysis and CPUC violated Colo. Rev. Stat. sec. 24-72-304 (1973) in refusing to provide Colorado-Ute with a copy of the WASP-82 computer program (Appellants' A-85); and (5) that the record in Case No. 6076 did not support the conclusion of CPUC that demand/energy rates were applicable to Colorado-Ute's system (Appellants' A-86).

In the district court in Case No. 84 CV 7, ARCO and Exxon argued (1) that CPUC's decision to allocate $24,084,126 in fixed costs to the energy component of the demand/energy rates was not supported by substantial evidence (Appellants' A-87); (2) that this allocation was arbitrary and capricious (Appellants' A-89); and (3) that CPUC failed to make adequate findings of fact to support this allocation (Appellants' A-90).

On May 7, 1986, the district court entered its order in both cases (Appellants' A-70). In case No. 83 CV 218, the district court accepted all of Colorado-Ute's arguments, except its argument that its constitutional rights had been violated by the introduction of testimony concerning the WASP-82 computer analysis (Appellants' A-85). The district court specifically ruled that CPUC did not violate

Colorado-Ute's rights to due process under the Fourteenth Amendment to the United States Constitution or under Colo. Const. art. II, sec. 25 (Appellants' A-85). In Case No. 84 CV 7, the district court accepted the arguments of ARCO and Exxon (Appellants' A-89, 90, 91).

Consistent with its rulings, the district court set aside CPUC's decisions in Case No. 6076 in both Case No. 83 CV 218 and 84 CV 7 (Appellants' A-86, 92).

CPUC appealed the district court's judgments in both cases to the Colorado Supreme Court (Case No. 86 SA 244). ARCO, Exxon and Shell appealed the district court's judgment in Case No. 83 CV 218 to the Colorado Supreme Court (Case No. 86 SA 246). Neither Colorado-Ute nor any of its members filed a Notice of Appeal or a Notice of Cross-Appeal in the Colorado Supreme Court challenging the district court's ruling that admission of testimony concerning the results of the WASP-82 computer analysis did not violate Colorado-Ute's due process rights under the Fourteenth Amendment to the United States Constitution or under Colo. Const. art. II, sec. 25. Also, in their briefs in the Colorado Supreme Court, Colorado-Ute and its members did not raise the WASP-82 issue or any supremacy clause, commerce clause or other federal constitutional issues.

On July 11, 1988, the Colorado Supreme Court issued its opinion (Appellants' A-1). In its opinion the court ruled 7-0 to reverse the district court's judgment in Case No. 83 CV 218, (Appellants' A-38), and ruled 4-3 to affirm the district court's judgment in Case No. 84 CV 7 (Appellants' A-47).

CPUC, Colorado-Ute, and 13 of its 14 members filed separate petitions for rehearing in the Colorado Supreme Court (Appellants' A-162, 175). In their petitions for rehearing, Colorado-Ute and its members raised for the first time in the Colorado Supreme Court commerce clause and supremacy clause issues and the issue that the admission of testimony concerning the WASP-82 analysis violated Colorado-Ute's due process rights (Appellants' A-166). On August 15, 1988, the Colorado Supreme Court issued its order denying all petitions for rehearing (Appellants' A-152).

ARGUMENT

I.

THE COURT DOES NOT HAVE JURISDICTION TO REVIEW THE WASP-82 QUESTION OR ANY COMMERCE CLAUSE OR SUPREMACY CLAUSE QUESTIONS.

It is necessary to the Court's jurisdiction under 28 U.S.C. sec. 1257 that a substantial federal question has been properly raised in the highest state court in which a decision could be had on that question.

As stated above, Colorado-Ute raised on judicial review in the state district court the issue that its due process rights under the Fourteenth Amendment to the United States Constitution and Colo. Const. art. II, sec. 25 had been violated by CPUC when CPUC permitted testimony concerning the results of the WASP-82 computer analysis. Neither Colorado-Ute nor its members raised any commerce clause or supremacy clause issues in the state district court.

Judicial Review of CPUC final decisions is specifically provided for in Colorado Statutes. *See* Colo. Rev. Stat. sec. 40-6-115 (1984) (App. 11). Section 40-6-115(2) specifically provides for challenging a final decision of CPUC "on the ground that it violates any right of a petitioner under the constitution of the United States . . . " (App. 11). For the reasons stated in its order, the district court ruled that the admission of testimony concerning the WASP-82 analysis did not violate Colorado-Ute's due process right under either the federal or state constitutions (Appellants' A-85).

Colo. Rev. Stat. sec. 40-6-115(5) (1984) provides, in part:

> Appellate reivew may be obtained in the supreme court concerning any final judgment of the district court on review, affirming, setting aside, or modifying any decision of the commission, in the same manner and with the same effect as appellate review of judgments of the district court in other civil action.

(App. 12). Pursuant to Colo. Rev. Stat. sec. 13-4-102(1)(c) (1973), the intermediate Colorado Court of Appeals does not have jurisdiction to review CPUC decisions.

As set forth above in the statement of facts, only CPUC, Exxon, ARCO and Shell appealed the district court's judgments to the Colorado Supreme Court. Under Colorado Appellate Rules, an appeal to the supreme court from a judgment of a state district court is perfected by filing a Notice of Appeal in the supreme court. *See* C.A.R. 3(a). *See also,* C.A.R. 3(a)(1), 3(b), (c) and (f) (App. 14-15). The Colorado Appellate Rules also provide for

cross appeals within 14 days after a timely Notice of Appeal has been filed. *See* C.A.R. 4(a). (App. 15-16).

Thus, it can be seen that procedures in Colorado courts provided ample opportunity for Colorado-Ute to present the WASP-82 issue to the Colorado Supreme Court, either by appeal, or by cross-appeal once CPUC, Exxon, ARCO and Shell had filed their appeals.

Neither the WASP-82 question, nor any commerce clause or supremacy clause questions were raised, briefed or argued by any party in the Colorado Supreme Court prior to the Court's opinion. Only after the Colorado Supreme Court had reversed the district court's judgment in Case No. 83 CV 218, did Colorado-Ute and its members raise the WASP-82 issue and other federal constitutional issues in their petitions for rehearing. (Appellants' A-162, 175). The Colorado Appellate Rules do not permit the filing of a response to a petition for rehearing, unless requested by the court and oral argument is not permitted. *See* C.A.R. 40(a). (App. 16). The federal constitutional issues, thus, were not briefed by CPUC, Exxon, ARCO, SWEPI, and only perfunctorily briefed by Colorado-Ute and its members in their petitions for rehearing. The Colorado Supreme Court did not separately rule on any specific issue raised by Colorado-Ute or its members in their petitions for rehearing. The Colorado Supreme Court simply denied all petitions for rehearing in a one sentence denial. (Appellants' A-153).

Raising a federal question for the first time in a petition for rehearing in the highest state court having jurisdiction to review the question is insufficient, unless the highest state court actually entertains the petition and

expressly decides the question. *Radio Station WOW v, Johnson,* 326 U.S. 120, 128 (1945); *Hanson v. Denkla,* 357 U.S. 235, 243-244 (1958); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932). The Colorado Supreme Court's one sentence denial of all petitions for rehearing was insufficient under 28 U.S.C. sec. 1257 to constitute a reviewable judgment by the highest court of the state in which a decision could be had. *Consolidated Turnpike Co. v. Norfolk & O.V. Ry. Co.,* 228 U.S. 326, 333-334 (1913); *Forbes v. State Council,* 216 U.S. 396, 399 (1910); *McCorquodale v. Texas,* 211 U.S. 432, 436-437 (1908).

It is submitted that this court does not have jurisdiction to review the federal questions raised in the Jurisdictional Statement.

II.

THE CASE ALSO DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION OR A SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

Colorado-Ute and its members in their jurisdictional statement attempt to portray this case as one involving the whoesale sale of electric power in interstate commerce. Colorado-Ute and its members also attempt to portray this case as one involving impairment by CPUC of loans made by the Rural Electrification Administration ("REA") to Colorado-Ute. Such is not the case.

This matter arose when Colorado-Ute filed an advice letter and two revised tariff schedules with CPUC notifying CPUC that Colorado-Ute would increase its wholesale rates to its member cooperatives by 12.157 percent.

The 12.157 percent increase went into effect on the date specified in the revised schedules. After an extensive hearing before CPUC, CPUC approved the 12.157 percent increase, but ordered Colorado-Ute to change its rate structure from an experimental unit pricing (flat energy rate) back to demand/energy. It is Colorado-Ute's objection to CPUC's direction to return to the more cost tracking demand/energy rate structure that has fueled Colorado-Ute's litigation in the courts of the State of Colorado, and now in this Court.

The tariff schedules filed by Colorado-Ute with CPUC applied *only* to its 14 member cooperatives. *All* delivery points at which electric power is metered and transferred from Colorado-Ute to its members are located within the State of Colorado. Colorado-Ute generates its electric power at coal-fired and hydro-electric powerplants located within Colorado. All of Colorado-Ute's members have been granted retail service territories by CPUC which are *wholely* within the State of Colorado.

In 1961, the Colorado legislature amended the Colorado "Public Utilities Law," Colo. Rev. Stat. Chapter 115, Articles 1-7 (1953), to declare cooperative electric associations to be affected with a public interest and to be public utilities subject to the jurisdiction, control and regulation of CPUC. *See* 1961 Colo. Sess. Laws, 627-628 amending section Colo. Rev. Stat. 115-1-3 (1963). The 1961 amendment to the Colorado "Public Utilities Law" was before the Colorado Supreme Court in *Western Colorado Power Co. v. Public Utilities Commission*, 159 Colo. 262, 411 P.2d 785 (1966), *appeal dismissed sub nom. Colorado-Ute Electric Association, Inc. v. Western Colorado Power Co.*, 385 U.S. 22

(1966), *reh'g denied*, 385 U.S. 984, a case involving a decision of CPUC authorizing Colorado-Ute to construct the Hayden powerplant. In the *Western Colorado Power* case, the second question considered by the Colorado Supreme Court was stated by the court as follows:

> Does Colo. Sess. Laws 1961, ch. 198, 115-1-3(2), which generally conferred jurisdiction over cooperatives in the Public Utilities Commission, violate the Constitution of Colorado or of the United States?

159 Colo. at 279. The Colorado Supreme Court answered the question in the negative. *Id.* The court also held that under the 1961 amendment Colorado-Ute was subject to the jurisdiction, control and regulation of CPUC. *Id.* at 280. Colorado-Ute appealed the Colorado Supreme Court's opinion to this court which dismissed the appeal for want of jurisdiction and denied certiorari. 385 U.S. at 22. CPUC has regulated Colorado-Ute's intrastate wholesale rates and service to its members since 1961 under the 1961 amendment (Appellants' A-100).

Thus, this is not a case where CPUC is attempting to assert jurisdiction for the first time over previously unregulated intrastate wholesale rates of a cooperative electric association, such as in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, Supra.* CPUC has been regulating Colorado-Ute's intrastate wholesale rates to its members for almost 28 years.

Other than the above distinction, CPUC submits that the *Arkansas Electric Cooperative Corp.* (AECC) case is "on all fours" with the instant case, and that this court's

opinion in the *AECC* case has already decided the commerce clause and supremacy clause questions that Colorado-Ute wishes to raise herein. In the *AECC* case, this court began its opinion by stating:

> This appeal requires us to decide whether the Arkansas Public Service Commission (PSC) acted contrary to the Commerce Clause or the Supremacy Clause of the Constitution when it asserted regulatory jurisdiction over the wholesale rates charged by the Arkansas Electric Cooperative Corporation (AECC) to its member retail distributors, all of whom are located within the state.

461 U.S. at 377.

The crucial facts in the *AECC* case are virtually indistinguishable from those herein: a generation and transmission ("G & T") cooperative electric association generating and selling at wholesale electric power to distribution cooperatives which are members of the G & T cooperative, which generation and sales are wholely within a single state. It is of interest to note that CPUC's Decision No. C83-1176 was rendered only 2 months after the issuance by this court of its opinion in the *AECC* case. This court's opinion on the commerce clause and supremacy clause questions are equally applicable in this case.

CONCLUSION

Wherefore, for the reasons stated above, appellee Public Utilities Commission of the State of Colorado respectfully requests that the court enter its order in this case dismissing the within appeal, or, in the alternative, affirming the judgment entered by the Colorado Supreme Court.

FOR THE COLORADO
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APPENDIX

Colorado-Ute Electric Association, Inc.

P.O. Box 1149

Montrose, Colorado 81402

(FILED DEC 15, 1981)

Telephone (303) 249-4501 TWX 910-929-6924

December 15, 1981

Advice No. 45

The Public Utilities Commission
of the State of Colorado
500 State Services Building
1525 Sherman Street
Denver, Colorado 80203

The accompanying scheduled issued by Colorado-Ute Electric Association, Inc., are sent to you for filing in compliance with the requirements of the Public Utilities Law:

1. First Revised Schedule B (cancels original Schedule B) to the contracts of Colorado-Ute, dated as of September 14, 1981, for wholesale electric service to the following members of Colorado-Ute, respectively:

Delta-Montrose Electric Association
Empire Electric Association, Inc.
Grand Valley Rural Power Lines, Inc.
Gunnison County Electric Association, Inc.
Intermountain Rural Electric Association
La Plata Electric Association, Inc.
Sangre de Cristo Electric Association, Inc.
San Isabel Electric Association, Inc.
San Luis Valley Rural Electric Cooperative, Inc.
San Miguel Power Association, Inc.
Southeast Colorado Power Association

White River Electric Association, Inc.
Yampa Valley Electric Association, Inc.

2. First Revised Schedule A (cancels original Schedule A) to the contracts of Colorado-Ute, dated as of September 14, 1981, for wholesale electric service to the following members of Colorado-Ute:

Holy Cross Electric Association, Inc.

A sufficient number of copies for filing one with each contract involved is submitted.

The purpose of this filing is to increase Colorado-Ute's revenues from its fourteen all-requirements members by approximately $11,120,603 or approximately 12.157%, based on sales during the twelve-month period ending October 31, 1981. Attached hereto are financial data supporting the proposed rate adjustment.

In Decision No. C78-1687, entered on December 21, 1978, in Investigation and Suspension Docket No. 1246, the Commission said:

> "In this docket, Colorado-Ute is acceding to the principles set forth by the Commission in its two prior rate cases and is utilizing a times interest earned ratio (TIER) of 1.92. The Commission states and finds that a TIER of 1.92 for Colorado-Ute continues to be fair and reasonable and will allow Colorado-Ute to maintain its financial integrity and to continue to attract capital on reasonable terms."

This TIER concept was again applied by the Commission in Investigation and Suspension Docket No. 1474, the Recommended Decision of the Examiner (No. R81-21) issued on January 9, 1981, which later became the decision of the Commission, providing, in part, as follows:

> "This Commission has historically determined Respondent's revenue requirements on the basis of

> the so-called TIER, and acronym for 'times-interest-earned ratio.' This approach is used because Respondent is financed almost entirely by long-term debt from various sources and will presumably continue to finance new construction and capital improvements by such method. Respondent's TIER is derived by dividing Respondent's net operating margins plus new interest (not including interest capitalized as AFUDC because it is included in the amount borrowed for a project) divided by such net interest. Over the last few years, the Commission has proceeded on the basis the Respondent should, when necessary, be authorized rates which resulted in a TIER of 1.92 on a fully adjusted test year basis."

The financial information attached hereto, supporting this rate adjustment of Colorado-Ute, is based on a TIER of 1.92, as found appropriate in the Commission decision. Utilizing said 1.92 TIER and applying the ratemaking principles set forth in prior Commission decisions, a revenue deficiency exists in the approximate amount of $35,220,883.

In order to minimize the financial impact on its member associations, Colorado-Ute has elected, by the present filing, to place in effect an increase in the amount of $11,120,603, rather than in the amount of the total revenue deficiency of $35,220,883.

This lesser increase is justified in that the Colorado-Ute financial forecast, based upon assumed inflation rates of 9%-7%-5% for the periods '81 thru '85, '86 thru '90, '91 thru '95, respectively, projects that over the total study period, net power costs will increase at an average annual compound rate of 7.1%. The effect of filing for a lower increase will be to levelize rate increases over the study period–thereby minimizing the financial impact on

the members of Colorado-Ute and the ultimate consumers served by such members. The percentage increases provided by the instant filing is approximately the same as the rate of inflation during the test year period.

The rate increase is intended to cover increases in costs over and above the costs included in the present rates, as follows:

Cents Per Kwh

	Present Rates	New Rates	Increase	Increase %
Interest Expense	1.006	1.234	.228	22.774
Fuel Costs	.724	.796	.072	9.889
Other Costs & Margins	1.792	1.920	.128	7.116
	3.522	3.950	.428	12.157

Annual Revenues

	Present Rates	New Rates	Increases	Increase %
Interest Expense	$26,119,429	$ 32,067,742	5,948,313	22.774
Fuel Costs	18,812,959	20,673,410	1,860,451	9.889
Other Costs & Margins	46,542,007	3,311,839	49,853,846	7.116
	91,474,395	102,594,998	11,120,603	12.157

A further reason for the filing of this rate increase in a lesser amount is the applicability of House Bill 1444, enacted into law by the last session of the Colorado Legislature. Under the provisions of this law, this rate filing becomes effective on thirty (30) days notice–thereby eliminating any regulatory lag in obtaining necessary rate relief. The applicability of this law reduces the need for

major percentage rate increases, and is of great help to Colorado-Ute in pursuing its Board policy to levelize the amount of rate increases, thereby minimizing the financial impact on its member associations.

Also attached hereto is a copy of the notice which has been mailed to the members of Colorado-Ute on the date of this letter in compliance with Rule 18 of the Commission's Rules of Practice and Procedures, and an affidavit of mailing.

This filing shall become effective on thirty (30) days statutory notice on January 15, 1982

Very truly yours,

/s/ Girts Krumins
President

GK-HSB:cml

Attachments as stated

Colorado-Ute Electric Association, Inc.

First Revised Schedule A
Cancels Original Schedule "A"

Availability

Available to all cooperative associations which are, or shall be, members of the seller. Electric power and energy furnished hereunder shall be separately metered and billed for each bulk delivery point. Service under this schedule shall constitute delivery of electrical power and energy at 44 kv or 69 kv, except as otherwise agreed upon.

Monthly Rate

Energy charge	$.03889 per kwh "I"
"I" signifies increase in rate	Advice Letter No. 45 Filing Date: 12/15/81 Effective Date: 1/15/82
Colorado-Ute Electric Association, Inc.	First Revised Schedule A Cancels Original Schedule "A"

Availability

Available to all cooperative associations which are, or shall be, members of the seller. Electric power and energy furnished hereunder shall be separately metered and billed for each load center delivery point. Service under this schedule shall constitute delivery of electrical power and energy at 7.2/12.5 kv or 14.4/24.9 kv, except as otherwise agreed upon.

Monthly Rate

Energy charge	.04378 per kwh "I"
"I" signifies increase in rate	Advice Letter No. 45 Filing Date: 12/15/81 Effective Date: 1/15/82

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF THE INVESTIGATION OF THE SCHEDULES ACCOMPANYING ADVICE LETTER NO. 45 FILED BY COLORADO-UTE ELECTRIC ASSOCIATION INC.	)))))	Case No. 6076 Volume IV

Denver, Colorado

October 25, 1982

Met pursuant to notice.

BEFORE: Commissioners Edythe S. Miller
Daniel E. Muse
Clarence Raymond Clark III

APPEARANCES:

(As previously noted.)

* * *

(p. 43) called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SCHIRO:

Q Would you please state your name and business address.

A My name is Warren L. Wendling; it is W-e-n-d-l-i-n-g. My business address is Room 520, State Services Building, 1525 Sherman Street, Denver.

Q By whom are you employed and in what capacity?

A I am employed by the Public Utilities Commission as an Engineering Analyst.

Q Have you prepared testimony and exhibits that were prefiled in this proceeding?

A Yes, I have.

Q Did your testimony and exhibits utilize the WASP-82 computer program?

A Yes, it did.

Q Can you briefly tell us for what purpose the WASP-82 program was used?

A The WASP-82 program was used to examine the potential benefits which would result from the use of a demand/energy rate on the retail level for all new all-electric customers of Colorado-Ute Electric Association. This was done by looking at the cost of production and capital (p. 44) expansion over a 20-year period. This was done by comparing two optimal generation expansion plans.

Q Mr. Wendling, did you attend a meeting on or about February 26, 1982 at the Commission with members of the Staff and Colorado-Ute employees?

A Yes, I did.

Q Could you name the people who were in attendance?

A In attendance at that meeting for the Staff was Dr. George Parkins, myself, and a consultant from the firm of Entek. Mr. Bob Bryant – in attendance at that meeting for Colorado-Ute was Mr. Bob Bryant, Mr. Raymond Keith and Mr. Larry Day.

Q At that meeting did your discuss the WASP-82 program?

A Yes. The purpose of that meeting was to explain to Colorado-Ute the data request that we were making upon them to receive the data that would be necessary to execute the WASP program. At that time we went to some detail to explain and describe the operation of the WASP-82 program and what we were going to do.

Q Mr. Wendling, I have just handed you what has been marked as Exhibit 44. Can you identify that for the record, please?

A Yes. Exhibit 44 is entitled a Simplified WASP-II Flow Chart. This is a diagram of the WASP-II program (p. 45) that was the basis for the WASP-82 program, and which we discussed at that February 26th meeting.

Q Did you explain each one of the modules in this program to Colorado-Ute?

A Yes, we did.

Q Did you also explain to Colorado-Ute at the February 26, 1982 meeting that the WASP-82 program would be used in the Staff's testimony and exhibits in the pending rate case?

A Yes, Dr. Parkins made that known to Mr. Bryant.

Q Did you provide Colorado-Ute with a copy of Exhibit 4 at the February meeting?

A Yes, we did.

MS. SCHIRO: I would like to move for the admission into evidence of Exhibit 44.

CHAIRWOMAN MILLER: Any objection to the admission of Exhibit 44?

MS. SCHIRO: I might note it is being offered for a limited purpose only, and that is for the purpose of the hearing on this motion for protective orders.

MR. BJELLAND: On that basis, no objection.

CHAIRWOMAN MILLER: Exhibit 44 is admitted.

Q (By Ms. Schiro) Mr. Wendling, since the February 1982 meeting have you personally received any inquiries from Colorado-Ute concerning the WASP-82 program?

* * *

40-6-115. Review by district court - mandamus. (1) Within thirty days after the application for a rehearing, reargument, or reconsideration is denied by the commission, the applicant may apply to the district court for a writ of certiorari or review for the purpose of having the lawfulness of the final decision inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of issuance and shall direct the commission to certify its record in the proceeding to the court. On the return day, the cause shall be heard by the district court, unless, for a good reason shown, the same be continued. No new or additional evidence may be introduced in the district court, but the cause shall be heard on the record of the commission as certified by it. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings.

(2) The findings and conclusions of the commission on disputed questions of fact shall be final and shall not be subject to review, except that, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of a petitioner under the constitution of the United States or the constitution of the state of Colorado, the district court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final.

(3) Upon review, the district court shall enter judgment either affirming, setting aside, or modifying the decision of the commission. So far as necessary to the decision and where presented, the district court shall

decide all relevant questions of law and interpret all relevant constitutional and statutory provisions. The review shall not extend further than to determine whether the commission has regularly pursued its authority, including a determination of whether the decision under review violates any right of the petitioner under the constitution of the United States or of the state of Colorado, and whether the decision of the commission is just and reasonable and whether its conclusions are in accordance with the evidence.

(4) The provisions of the Colorado rules of civil procedure relating to writs of certiorari or review, so far as applicable and not in conflict with the provisions of articles 1 to 13 of this title, shall apply to proceedings had in the district court under the provisions of this section. No court of this state, except the district court to the extent specified, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties; but an action in the nature of mandamus shall lie from the district court to the commission in all proper cases.

(5) All actions for review shall be commenced and tried in the district court in and for the county in which the petitioner resides, or if a corporation or partnership in the county in which it maintains its principal office or place of business, or in the district court of the city and county of Denver, at the option of the petitioner. Appellate review may be obtained in the supreme court concerning any final judgment of the district court on review, affirming, setting aside, or modifying any decision of the

commission, in the same manner and with the same effect as appellate review of judgments of the district court in other civil actions.

CHAPTER 32

COLORADO APPELLATE RULES

Rule 1. Scope of Rules

(a) Matters Reviewable. An appeal to the appellate court may be taken from:

(1) A final judgment of any district, superior, probate, or juvenile court in all actions or special proceedings whether governed by these rules or by the statutes;

* * *

Rule 3. Appeal as of Right - How Taken

(a) Filing the Notice of Appeal in Appeals from Trial Courts. An appeal permitted by law from a trial court to the appellate court shall be taken by filing a notice of appeal with the clerk of the appellate court within the time allowed by C.A.R. 4. Upon the filing of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal and all procedures concerning the appeal unless otherwise specified by these rules. An advisory copy of the notice of appeal shall be served on the clerk of the trial court within the time for its filing in the appellate court. Failure of an appellant to take any step other than the timely filing of a notice of appeal in the appellate court does not affect the validity of the appeal, but is a ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal. Content of the notice of appeal shall not be deemed jurisdictional.

Comment: This change requires the direct filing of the notice of appeal with the appellate court.

(b) Filing the Notice of Appeal or Petition for Review in Appeals from State Agencies. An appeal permitted by statute from a state agency directly to the Court of Appeals or appellate review from a district court shall be in the manner and within the time prescribed by the particular statute.

(c) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

* * *

Rule 4. Appeal as of Right - When Taken

(a) Appeals in Civil Cases (Other than Appeals or Appellate Review Within C.A.R. 3.1). In a civil case in which an appeal is permitted by law as of right from a trial court to the appellate court the notice of appeal required by C.A.R. 3 shall be filed with the appellate court with an advisory copy served on the clerk of the trial court within forty-five days of the date of the entry of the judgment or order appealed from if the parties are present at the time such judgment is announced. In appeals from district court review of agency actions, such notice of appeal shall be in addition to the statutory thirty-days notice of intent to seek appellate review filed with the district court required by 24-4-106 (9). If notice

of the entry of judgment is transmitted to the parties by mail, the time for the filing of the notice of appeal shall commence from the date of the mailing of the notice. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days of the date on which the first notice of appeal is filed, or within the time otherwise prescribed by this section (a), whichever period last expires.

* * *

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within fourteen days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

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